



**Nasiuma v Kakai (Environment & Land Case 16 of 2018)  
[2023] KEELC 20599 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20599 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 16 OF 2018**

**EC CHERONO, J**

**OCTOBER 12, 2023**

**IN THE MATTER OF LIMITATION OF ACTIONS CAP 22 LAWS OF KENYA  
AND IN THE MATTER OF LAND PARCEL NO NDIVISI/MUCHI/3250**

**BETWEEN**

**PROTUS MANDILA NASIUMA ..... PLAINTIFF**

**AND**

**MARGARET NAMAEMBA KAKAI ..... DEFENDANT**

**RULING**

**BACKGROUND**

1. This application is dated June 7, 2023 and is brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 8 of the [Civil Procedure Rules](#) seeking the following orders:
  1. That this honourable court be pleased to grant leave to the Defendant/Applicant to amend her pleadings.
  2. The draft pleadings herein defence and counterclaim be adopted as the Defendant/applicant's pleadings and duly filed.
  3. Costs in the cause.
2. The application is supported by the annexed affidavit of Margaret Namaemba Kakai sworn on June 7, 2023 and the grounds on the face of the application. The respondents were served and opted not to file any response to the application.
3. The applicant in her supporting affidavit deposed that she had initially instructed the firm of Situma & Co. Advocates who entered appearance and filed defence and other pleadings on her behalf but she later instructed the firm of B/S Advocates LLP after the pleadings had closed. That the current application



is necessitated by the need to amend her defence and counter claim to allow the court determine the case to finality thus saving the courts time.

4. The Notice of motion is expressed to be brought under Section 1A,1B & 3A of the [Civil Procedure Act](#) and Order 8 of the [Civil Procedure Rules](#) which deals with leave to file pleadings out of time and provides as follows;

General power to amend (Order 8, Rule 5)

1. For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs an on such terms as to costs or otherwise are just.

5. Section 1A of the [Civil Procedure Act](#) provides for the overriding objective of the [Civil Procedure Act](#) and the rules made thereunder and provides as follows:

- “1A The overriding objective of this Act and the rules made hereunder is to
- (1) facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

6. Section 1B of the same [Act](#), on the other hand provides for the duty of court and states:

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.

7. The gist of the Applicant’s application is for leave to file an amended Defence out of time. It is therefore my view that the single issue for determination is whether this application is merited.

8. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other party can be compensated by costs.



9. Order 8 Rule 5 (1) of the [Civil Procedure](#) gives the court a wide discretion as far as amendment of pleadings is concerned. This discretion may be exercised at any stage of the proceedings, that is to say, before or at the trial, after the trial, after judgment or on appeal. From the above provisions it is clear that Amendments ought to be allowed when:
  - a. . They do not work injustice to the other side
  - b. They are necessary for the purpose of determining the real questions in controversy between the parties.
10. This position has been restated in various cases notably; [Bosire Ongero Vs Royal Media Services](#) 2015 KLR. Also see [Ochieng and 2 others v First National Bank of Chicago](#) (1995) eKLR, and [St. Patrick's Hill School Limited v Bank of Africa Kenya Limited](#) [2018] eKLR.
11. The courts would not normally grant an application for amendment of pleadings where the proposed amendment would have the effect of creating a new cause of action which is time- barred. This was stated in [Nzirane V Lukwago](#) 1971 EA 328.
12. The main principle is that amendment should not be allowed if it will cause injustice to the other side. In [Institute for Social Accountability & Another V Parliament of Kenya and 3 Others](#) 2014 KLR a three judge bench of Lenaola, Mumbi and Majanja J stated that;

“the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings”
13. Lastly, amendments should be freely allowed provided they are not done in bad faith and they do not occasion injustice to the other party which cannot be compensated by way of costs. Justice J.B Havelock in the case of [Daniel Ngetich & Another Vs KRep Bank Limited](#) 2013 KLR stated that

“Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court.”
14. In determining applications such as the current one the court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work an injustice.
15. The proposed amendment seeks to introduces a counter claim in terms of a permanent injunction and orders of eviction which in my view are triable issues. This question can only be answered if it is pleaded in Defense. In my considered view, what the applicant seeks to introduce in the proposed Amendment will not prejudice the plaintiff but will assist the court in determining once and for all, the real issues in controversy.
16. I have carefully considered the application and the supporting affidavit and I am persuaded that the application is merited and I allow it. Therefore, I accordingly allow the application and direct that the Applicant do file their Amended Defence within 7days of this ruling. The Plaintiff will have the costs of this application.



Order accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of**

1. Applicant/Advocate-absent
2. Respondent/Advocate-absent
3. M/S Joy C/A-present.

